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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Respondent.

Brief of Petitioner (Plaintiff) On Merits

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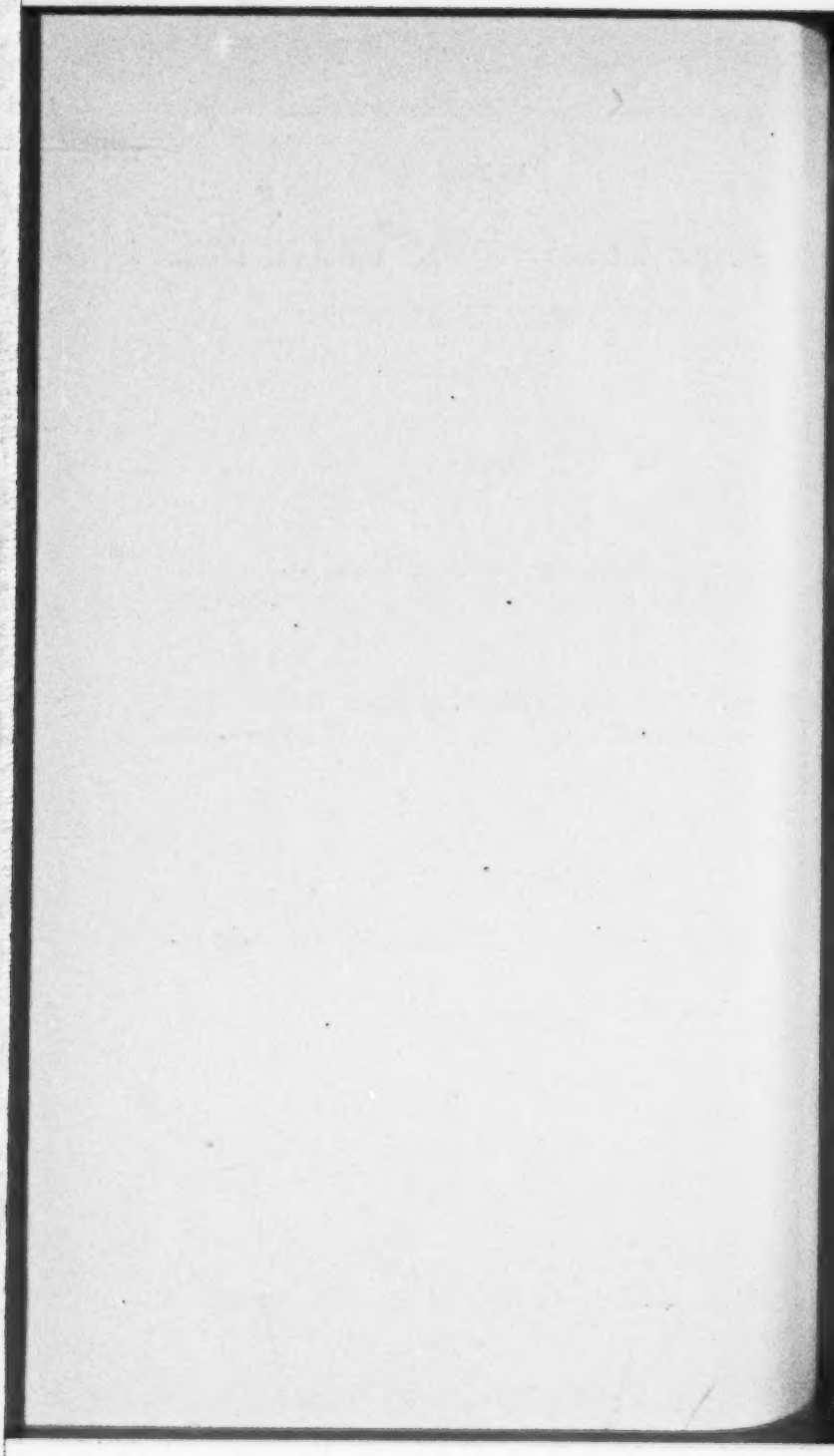

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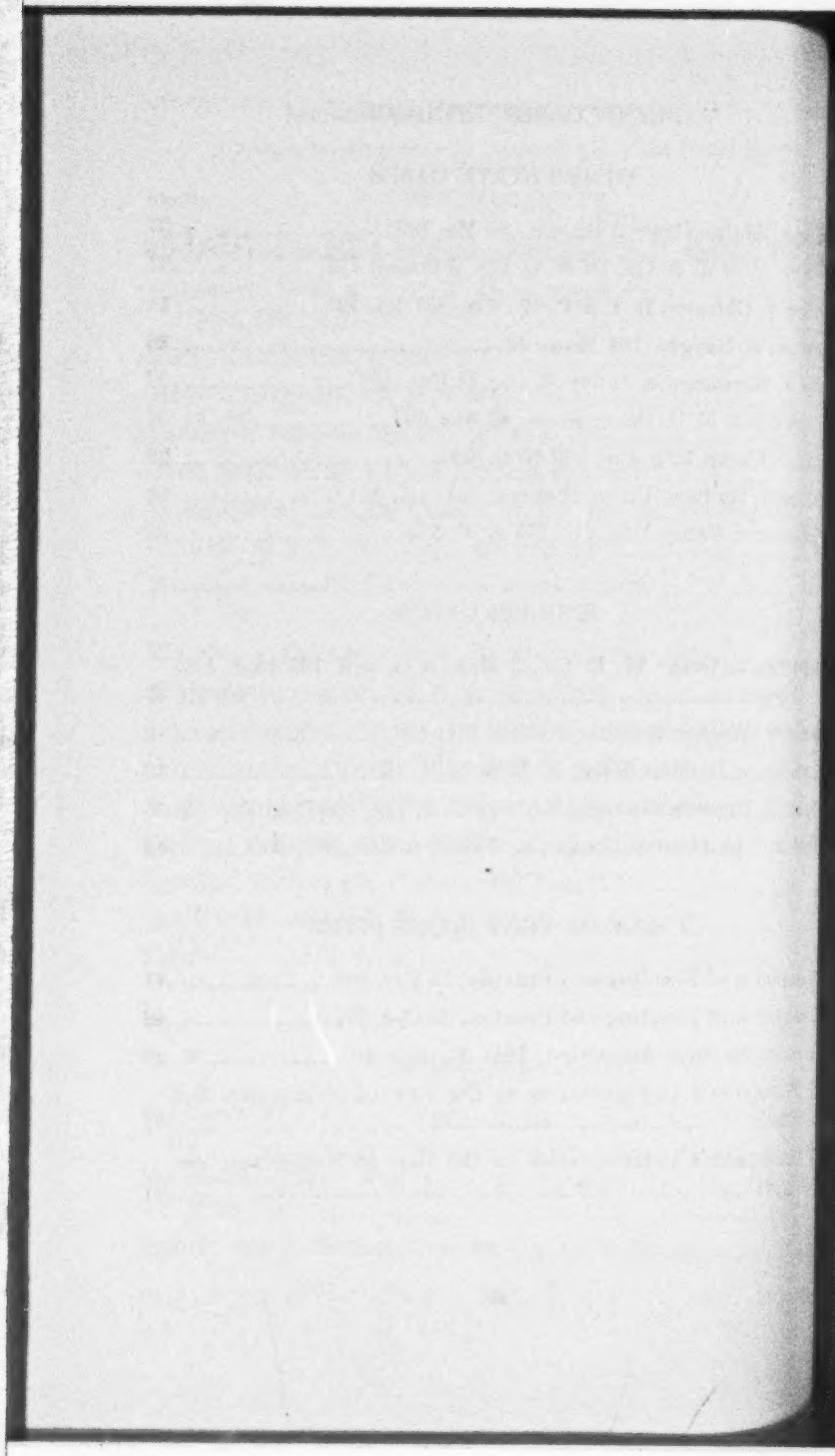

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OPINIONS OF COURTS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 28 Fed. (2d) 574 and in the record at pages 114-120. The opinion of

the District Court for the Western District of Washington, Northern Division, appears in the record at pages 101-104.

JURISDICTION OF THIS COURT

The date of the judgment of the Circuit Court of Appeals which is to be reviewed is October 15, 1928 (R. 121). Petitioner heretofore petitioned this court for a writ of certiorari, invoking this court's jurisdiction under Judicial Code Section 240, as amended by the act of February 13, 1925, 43 Statutes at Large 938. This court made an order granting said petition on February 25, 1929 (R. 123).

STATEMENT OF THE CASE

Petitioner is a Washington corporation (R. 3). Respondent is a Wisconsin corporation (R. 4). Petitioner, as plaintiff, brought suit against respondent, as defendant, in the United States District Court for the Western District of Washington, Northern Division, for the recovery of $20,481.90 (R. 3-10).

Prior to the commencement of the suit, petitioner issued two policies of fire insurance to Peter Agor. These policies covered wool and sacks while contained in a warehouse located at Badger, in the State of Washington. On May 2, 1926, while these policies

were in force, the warehouse and its contents were destroyed by fire (R. 4, 7, 88, 100). Petitioner paid the loss sustained by Peter Agor, which amounted to $20,481.90, and, under claim of subrogation, commenced its suit against respondent. (R. 5, 6, 8, 9, 95.)

Petitioner alleged that the fire was started by sparks, cinders, or live coals emitted from one of respondent's passing locomotives and that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders, or live coals to escape and cause the fire. (R. 5, 8.)

Respondent admitted that the fire occurred and that the wool and sacks were destroyed. Respondent denied that one of its locomotives set the fire and that it was guilty of any negligence. (R. 11, 12.)

The case came on for trial on November 4, 1927 (R. 45-100), and petitioner's evidence showed facts and circumstances sufficient to require the submission to the jury of the question of whether or not one of respondent's locomotives set the fire. The Circuit Court of Appeals reached this conclusion when the case came before it on appeal (R. 118).

Petitioner's evidence also showed: that the country in which the fire occurred was very dry (R. 71); that on the day of the fire the wind was blowing from

the railroad tracks toward the warehouse which the fire destroyed (R. 51); that about fifteen minutes prior to the discovery of the fire one of respondent's trains passed by the warehouse (R. 84, 86), going upgrade (R. 86. 91); that the grade was quite stiff (R. 59) and that the trains generally pull quite hard (R. 59, 91); *that because of the heavy grade the railroad company sometimes divides its trains* (R. 91) *but that the freight train which passed on this occasion consisted of seventy cars and was hauled by two locomotives* (R. 85).

At the conclusion of petitioner's evidence respondent moved for a judgment of nonsuit (R. 100). The court granted the motion (R. 100), to which petitioner duly excepted (R. 104), and thereafter judgment of nonsuit was entered. (R. 16.)

Petitioner duly filed assignments of error (R. 40-42), and then appealed (R. 39-44, 104-109), specifying as errors relied upon that "the court erred in granting the motion for judgment of nonsuit and entering the judgment of nonsuit for the reason that the granting of said motion and the entering of said judgment wrongfully prevented the jury from considering and deciding questions of fact alleged in plaintiff's complaint and testified to by plaintiff's witnesses."

On October 15, 1928, the Circuit Court of Appeals rendered its opinion and affirmed the judgment of nonsuit of the District Court and, upon the same day, its judgment was filed and entered. (R. 120, 121.) In its opinion (R. 114-120) the Circuit Court of Appeals held:

1. That petitioner's evidence was sufficient to warrant the jury finding that one of respondent's locomotives set the fire and therefore was sufficient to call for the submission of this question to the jury. (R. 118.)

2. That petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent in setting the fire or to warrant the jury inferring that respondent was negligent in setting the fire. (R. 119, 120.)

Petitioner then filed in this court its petition for a writ of certiorari and at page 4 in said petition, under the heading "Assignments of Error," alleged:

"The Circuit Court of Appeals erred in finding and holding that your petitioner's evidence was not sufficient, to raise a *prima facie* presumption that respondent was negligent or to warrant the jury in inferring that respondent was negligent."

At page 10 of its brief in support of its petition for a writ of certiorari petitioner, under the heading "Specifications of Error," stated:

"The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court, because the question of whether or not the railroad company was guilty of negligence was a question of fact which your petitioner was entitled to have the jury pass upon."

The petition for the writ of certiorari was granted (R. 123) and this case is now before this court on its merits.

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in granting the motion for judgment of nonsuit and in entering the judgment of nonsuit (See I and II of "Assignments of Error" in Record at pages 40 and 41).

2. The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court. (See "Assignment of Errors" at page 4 in the petition for the writ of certiorari.)

The question of whether or not the railroad company was guilty of negligence was a question of fact which petitioner was entitled to have the jury pass upon and both lower courts erred in depriving petitioner of this right.

THE ARGUMENT—FIRST POINT

Petitioner contends that the evidence discloses facts from which a reasonable person could have justifiably drawn the inference that respondent was negligent.

Respondent sometimes divided its trains, before running them over the stiff upgrade past Badger, in order to avoid the extra laboring caused by the upgrade. Respondent did not divide the freight train that passed Badger fifteen minutes before the fire was discovered. That train was not only undivided but it was a double-header consisting of seventy freight cars. Although the country was dry and conditions were favorable to the igniting of a fire respondent chose to increase the fire hazard rather than to take the precaution which it sometimes took.

The rule of law applicable to petitioner's contention is too well settled to require restatement.

In *McDermott v. Severe*, 202 U. S. 600, at 604, this court said:

"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence."

In *Maryland Casualty Co. v. Jones*, (June 3, 1929), -------- U. S. ------, 73 L. Ed. ------, this court points out that a motion for a non-suit corresponds

to a motion for a directed verdict and presents the question of whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, is sufficient to sustain a judgment.

The nature of the case at bar is such that the information relating to respondent's negligence or lack of negligence is readily available to respondent and inaccessible to petitioner. For this reason a portion of the opinion in *Catholic University v. Waggaman*, 32 App. D. C. 320, which is quoted with approval in *Terminal Taxicab Co. v. Blum*, 298 Fed. 679, is particularly in point:

"The courts of this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury. * * * These narrow restrictions apply where the court has before it the whole case. *Even less latitude is allowed where the jury are peremptorily instructed as the conclusion of the plaintiff's affirmative case that where such an instruction is given when all the evidence of the parties is before the court.*" (Italics supplied).

Petitioner submits that its evidence discloses facts from which a reasonable man could justifiably infer that respondent was negligent.

THE ARGUMENT—SECOND POINT

Petitioner's second and final contention, to which the remainder of this brief will be devoted, is that proof that a railway company set a fire creates a *prima facie* presumption (of fact, not of law), that the railway company was guilty of negligence and thereby raises a question of fact for the jury which may then infer that the railway company was negligent or refuse to draw that inference.

ILLUSTRATIVE CASES

The English case of *Aldridge v. Great W. R. Co.* (1841) 3 Man. & G. 515, 133 Eng. Rep. 1246, is a good illustration of petitioner's point. This was a railway fire case. The property destroyed was adjacent to the railway's tracks. The plaintiff alleged that the fire was caused by the careless management and operation of one of defendant's locomotives. The parties agreed that defendant's locomotives were such as were usually employed on railways and that one of them set the fire complained of and, at the time of the setting of said fire, was being used in the ordinary manner and for the purposes authorized by the act of parliament incorporating the railway company. The agreed statement of facts did not state or show that

such a fire had ever happened before or that sparks had ever previously come from the locomotive.

Upon these facts the case was submitted to the court which was requested to enter judgment of nonsuit or judgment for the plaintiff, according to its opinion. A statute permitted the court to accept and decide a case in which all the facts were agreed upon.

The court held that the facts before it did not permit it to enter either judgment for the plaintiff or judgment of nonsuit. The court held that it could not draw the inference that the defendant was negligent, or find that the defendant was not negligent, without deciding a question of fact, and, therefore, that the case was not of the kind contemplated by the statute relating to agreed cases and would have to go to trial in order that the question of fact might be decided. One of the three judges, all of whom concurred in the decision, remarked that there would probably be a difference of opinion among the judges if they had to decide whether or not the railway company was guilty of negligence.

In the early Alabama case of *Louisville & N. R. Co. v. Reese*, (1889), 85 Ala. 497, 5 So. 283, the court pointed out that "experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage when the engines are properly con-

structed," equipped, and managed, and, therefore, "when the fire originates from sparks emitted by a locomotive in sufficient quantity or volume to cause damage" a "reasonable inference may arise * * * that the engine was not properly constructed" or equipped, or that it was "not managed with care. When the inference is repelled by proof of the proper construction * * * and * * * management the plaintiff cannot maintain the action without making proof of other negligence or want of care. The extent of the rule is that injury caused by fire escaping from an engine is a circumstance from which the inference of negligence in construction and management of the engine may be reasonably drawn, * * * ".

The force of the inference, or the presumption of fact, is demonstrated by the case of *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.* 96 Wash. 113, 164 Pac. 765. In this case there was not a scintilla of evidence to the effect that the locomotive was not properly constructed and equipped, the evidence of both sides agreeing that the spark arresting device used was the best known appliance on the market for the purpose for which it was designed. The court held that the presumption of negligence due to improper construction and equipment was repelled by the evidence, and should not have been submitted to the jury, but that there was no evidence to repell the

presumption that the locomotive was carelessly managed and the question of whether or not the railroad was negligent in failing to *operate* its locomotive with ordinary and reasonable care and skill was properly submitted to the jury.

The Circuit Court of Appeals acknowledged that the law in the State of Washington is in harmony with petitioner's contention (R.119), but it refused to follow the local law as it erroneously construed the federal cases as opposing the Washington rule.

THE FEDERAL CASES

There are a number of federal cases wherein the rule is stated to be that proof that a fire is of railroad origin raises a presumption (of law) of negligence, and shifts the burden of proof so that the defendant railway company must show that it was free from negligence in order to escape liability. There are other federal cases wherein it is denied that this is the rule, but there is no federal case in which the jury, in the absence of any explanation of the fire or showing of the exercising of care on the part of the railway company, was denied the privilege of inferring (from the fact that the fire was of railroad origin) that the defendant railway company was guilty of negligence.

Petitioner does not go so far as to contend that proof that a fire is of railroad origin creates a legal presumption of negligence. Petitioner only contends that such proof creates a *prima facie* presumption (of fact) of negligence which authorizes the drawing of the inference of negligence. If the fire is wholly unexplained the jury may draw the inference that the railway company was negligent, or it may refuse to draw such inference (in which case the plaintiff fails to establish negligence and cannot recover), but, as the English court held in *Aldridge v. Great W. R. Co., supra*, the question of negligence cannot be decided one way or the other without a question of fact being passed upon.

The federal cases which will now be given attention will be found to be in complete accord if every reference to a presumption of negligence in such cases is considered to mean a *prima facie* presumption of fact such as petitioner contends exists and requires that the question of negligence be submitted to the jury. The actual holdings of the federal cases are consistent with this view.

FAVORABLE FEDERAL CASES

The decision of the Circuit Court of Appeals in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Eight Circuit in *McCullen v. Chicago & Northwestern Railway Company* (1900), 101 Fed. 66, upon the same matter. The *McCullen* case is directly in point and in the opinion by Thayer, J., the court said:

"It is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. * * * These reasons have led most courts to hold, —and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employes, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled."

The *McCullen* case was cited with approval in *Great N. Ry. Co. v. Coats*, 115 Fed. 452 (C. C. A. 8th Circuit), which also arose in South Dakota. In the *Coats* case the evidence established a specific act of negligence, but it is apparent from that portion of the opinion quoted below that Thayer, J., was of the opinion that a presumption of negligence was established by the tracing of the origin of the fire and

did not depend, for its existence, upon the proof of the specific act of negligence. Thayer, J., said:

"The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed."

Missouri Pac. R. Co. v. Texas & P. R. Co. (1888), 33 Fed. 360, and *Missouri Pac. R. Co. vs. Texas & P. R. Co.* (1888), 33 Fed. 361 are almost the same as to the facts. In each case an intervener in a receivership proceeding filed a claim for damage alleged to have been caused by sparks or fire escaping from a locomotive. In each case it was shown that the railway company caused the fire but in neither case was there any evidence of negligence. The master allowed both claims and the receiver, in each case, filed an exception to the master's report. The court overruled the exceptions and held that the proof of the fact that the railway company caused the fire rendered the railway company liable for the damage done thereby in view of the fact that in neither case had the railway company rebutted the presumption of negligence raised against it. These two cases arose in Louisiana. Neither opinion disclosed or referred to any Louisiana statute creating a presumption of negligence and in the later Lousiana case

of *Fuller v. Chicago, R. I. & P. Ry. Co.* (1915), 137 La. 997, 69 So. 804, there is no reference to such a statute although the presumption theory is advanced and followed.

In *Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co.* (1902), 114 Fed. 133, the case was submitted to the jury, which found for the defendant railway company. The judgment of the District Court was affirmed on appeal. The actual holding of this case is perhaps not in point but parts of the opinion are significant for the reason that they express the views of the Circuit Court of Appeals for the Eight Circuit upon the question of the presumption of negligence.

At page 139 of the opinion it is pointed out that the trial Court charged the jury as follows:

"If you determine that the fire which destroyed the cotton of the Lesser Cotton Company was caused from sparks or cinders communicated from the defendant's engine, then the burden of proof is shifted upon the defendant, and it must overcome the presumption of negligence arising from this finding. It must show that there was no defect in the engine, that there was no negligence in the manner of its operation by its employes, and that they were skillful men. In other words it must prove by a preponderance of the evidence that there was no negligence . * * * "

In commenting upon this instruction the Circuit Court of Appeals, at page 139, said:

"Thus read it will be found to state the established rules of law relative to the subjects under consider-

ation as favorably to the plaintiffs as controlling authorities will warrant. The burden of proof was upon the plaintiffs to establish the casual negligence of the defendant. When they proved, if they did, that the fire was caused by sparks emitted by the defendant's engine, that burden shifted to the defendant, and required it to establish by a fair preponderance of evidence that it had exercised reasonable care to provide the most effective mechanical contrivances in known practical use to prevent the burning of private property by the escape of fire from its engines."

Eddy v. Lafayette, (1892), 49 Fed. 807, arose in Indian Territory. The trial court instructed the jury as follows:

"The court further instructs the jury that evidence showing that the fire originated from sparks from a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

The jury found for the plaintiff. The case was then carried to the Circuit Court of Appeals for the Eight Circuit. Seventy-four errors were noted in the assignment of errors and forty of these were relied upon to secure a reversal. In referring to the instructions the Circuit Court of Appeals said:

"It also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence. * * * It is also incumbent on a railway company to show that it has used all those reasonable precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire, which was occasioned by sparks or cinders from a

passing locomotive. The decisions to this effect are both numerous and uniform. Shear & R. Neg. Sec. 676, 678 and citations."

The Circuit Court of Appeals affirmed the judgment of the District Court and the case was then carried to the United States Supreme Court (*Eddy v. Lafayette*, 163 U. S. 456) where it was contended that the instruction quoted above was erroneous and that the Circuit Court of Appeals erred in not correcting the alleged error. The Supreme Court affirmed the judgment of the Circuit Court of Appeals but refused to pass upon the propriety of the instruction. The Supreme Court disposed of this claim of error in the following words:

"It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals."

The question of whether or not proof that a fire was ignited by sparks from a locomotive raises a presumption of negligence has been before the courts ever since railways have been operated but the Supreme Court of the United States has never decided this question or come any closer to deciding it than it did in the *Eddy* case.

The *Eddy* case was cited with approval in the *McCullen* case and also in the *Coats* case.

HOSTILE FEDERAL CASES

The cases discussed under this heading are the five cases cited by the Circuit Court of Appeals in support of its decision. This is the only reason they are referred to as hostile for not one of them decides the issue in the case at bar contrary to petitioner's contention. These cases will be considered in the order in which they were decided.

1. *Nitro-Glycerine* case (1872) 15 Wall. 524, 21 L. Ed. 206.

The plaintiff sued the defendants, who composed the well known firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to a building owned by plaintiff and occupied by defendants as plaintiff's tenants. The building was damaged by the explosion of a box of nitro-glycerine while it was in charge of the defendants. The issue was whether or not the defendants were guilty of negligence in the manner in which they handled the box.

The case was tried by court without the intervention of a jury. The manner in which the box was handled was fully explained and the court found that the defendants did not know, or have any means of knowing, what the box contained. The trial court found that there was no negligence on the part of

the defendants and entered judgment in their favor. This decision was affirmed by the United States Supreme Court.

This was not a case in which the plaintiff was nonsuited without being given the opportunity to have a judicial determination of the care exercised by the party causing the damage and in possession of all the information relating to the happening of the accident. The accident was fully explained and the court found as a fact that there was no negligence on the part of the defendants. Petitioner does not regard this case as hostile to its contention as petitioner does not contend that proof of the setting of a fire by a railway company is conclusive evidence of negligence. Petitioner concedes that the *prima facie* presumption of fact which such proof raises may be overcome by evidence of due care and lack of negligence. Petitioner only contends that such proof, in the absence of any explanation, raises an issue of fact for the jury. In the *Nitro-Glycerine* case there was no jury. The trial court could not decide the case one way or the other without deciding that there either was, or was not, negligence. In passing upon this question it was obliged to decide, and did decide, a question of fact. *Aldridge v. Great W. R. C., supra.*

The opinion in the *Nitro-Glycerine* case was written by Field, J., who said:

"The gist of the action is the negligence of the defendants. Unless that be established they are not liable. The mere fact that injury has been caused is not sufficient to hold them. * * * A party charging negligence as a ground of action must prove it."

Petitioner has no objection to this statement. It has always been held that the mere fact that someone has been injured does not make out a case. It is the proof of the fact of the accident (not the injury) that creates a *prima facie* presumption of fact as to negligence if the nature of the accident is such that it would not be likely to happen in the absence of negligence. This legal difference between proving the fact of the injury and the fact of the accident is clearly pointed out in *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* (1905), 139 Fed. 528, (at 533) which is one of the cases relied upon by the Circuit Court of Appeals in the case at bar.

There is a large class of cases in which proof that the defendant caused the accident resulting in injury warrants the drawing of the inference of negligence in the absence of any explanation or showing of due care by the defendant. Railway fire cases come within this class. In such cases proof that the defendant caused the accident together with the inference of negligence draw therefrom, if such inference

is drawn, (the jury is not required to draw such inference but may or may not draw it), establishes negligence and warrants a recovery by the plaintiff.

In saying that the party charging negligence must prove it Justice Field did not intend to convey the impression that in a railway fire case the plaintiff could not establish negligence by (1) showing that the defendant caused the fire and (2) inducing the jury to draw the inference, from that fact, that said fire was caused by negligence. Justice Field could not have intended to be so understood because, long before the decision of the *Nitro-Glycerine* case, he concurred in an opinion of the Supreme Court of California which held to the contrary.

The case referred to is *Hull v. Sacramento Valley Railroad Co.* (1859), 14 Cal. 388, wherein the evidence showed no specific act of negligence. The court held that the case was one for the jury on the theory that proof of the fact that the fire was caused by one of the defendant's locomotives, along with proof that this result would not be probable from the ordinary working of the engine, was sufficient to make out a *prima facie* case of negligence and require the submission of the case to the jury. The jury found for the plaintiff and the court held that it could not review the jury's finding upon this question of fact.

This case was decided in 1859. Perhaps it was then the law that the plaintiff, in order to raise the presumption of negligence, had to show, in addition to the fact of the fire, that the setting of a fire was not probable from the ordinary working of the locomotive. This is no longer the law, if it ever was, as it is now a matter of common knowledge that the ordinary laboring of a locomotive is not likely to cause a fire. In *Louisville L. N. R. Co. v. Reese*, (1889), 85 Ala. 497, 5 So. 283, the court said:

"Experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage, when the engines are properly constructed, are supplied with the most approved appliances for preventing the escape of fire, and are managed with care."

Petitioner submits that the *Nitro-Glycerine* case is not injurious to its position.

2. The second of the cases cited by the Circuit Court of Appeals in support of its decision is *Garrett v. Southern Ry. Co.* (1900), 101 Fed. 102. The opinion was written by the present Chief Justice of the United States. Taft, J., said:

"The sole question presented for our consideration is whether the rule which the court laid down as to the burden of proof was correct. * * * The court below, in effect, instructed the jury * * * that if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, *then the*

jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, *as a matter of law*, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant." (Italics supplied).

Petitioner has never contended, and does not now contend, that proof that a fire was caused by sparks from a locomotive created a *presumption of law* that there is negligence on the part of the railway company. Petitioner only contends that such proof creates a *prima facie* presumption *of fact* warranting, but not requiring, the drawing of the inference that there was negligence. The trial court, in the *Garrett* case, expressly informed the jury that it could draw this inference if it chose to do so and Taft, J., in the last paragraph of the opinion, said:

"The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could *as a matter of fact*, that it was caused by negligence; but the court declined to charge them, *as a matter of law*, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the Supreme Court of the United States has followed. (Italics supplied).

This states petitioner's position very clearly and is in full accord with petitioner's contention. Petitioner's only present request is that the Supreme

Court of the United States adhere to the view expressed by its present Chief Justice when he wrote the opinion in the *Garrett* case.

The *Garrett* case refers to the *Nitro-Glycerine* case which requires no further discussion.

3. The third case cited by the Circuit Court of Appeals in support of its decision is *Cincinnati N. O. & T. P. R. Co. v. South Fork Coal Co.* (1905), 139 Fed. 528. Two of defendant's freight trains collided and wrecked. The collision started a fire which spread to and destroyed plaintiff's lumber. The issue was whether or not the collision was caused by negligence. The defendant's contention, on appeal, was that there was no evidence from which negligence could be inferred. The Circuit Court of Appeals held that the fact of the collision warranted the drawing of the inference of negligence and justified the trial court's refusal to direct a verdict. The trial court submitted the case to the jury which found for the plaintiff.

In the opinion, which was delivered by Lurton, J., the court, in referring to cases wherein a fire is shown to have been caused by sparks escaping from a locomotive, said:

"At the common law a *prima facie* case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use

of such engine being sanctioned by statute there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of the action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks *in view of the fact that some sparks will escape despite the use of appliances to arrest them.*" (Italics supplied).

Inasmuch as the issue was whether or not the collison was caused by negligence this reference to the law relating to fires caused by escaped sparks was dictum. The court held that a collision, unexplained, created a *prima facie* presumption of fact of negligence. Why, then, should not a fire caused by the escape of sparks, unexplained, do likewise? (A collision could occur, without negligence, as readily as a fire caused by sparks could occur without negligence). To hold that it does not do so "because some sparks will escape despite the use of appliances to arrest them" is to hold that a *prima facie* presumption of fact cannot be raised except when the nature of the accident is such as to preclude the possibility of a non-negligent cause. To insist that the accident must be of such a nature as to preclude the possibility of a non-negligent cause would be to destroy all *prima facie* presumptions of fact since, on that hypothesis, the happening of the accident would furnish conclusive evidence of negligence. (See note in L. R. A. 1917 E. page 43).

The Court's inadvertent dictum which is quoted above is illogical and in conflict with the decision in the very case in which it appears. It is submitted that this dictum in no way weakens petitioner's contention. The case in which it is contained recognizes the propriety of drawing the inference of fact of negligence from the unexplained happening of an accident not likely to occur without negligence and in this supports the general proposition for which petitioner contends.

4. *Toledo, St. Louis & W. R. R. Co. v. Starr Flouring Mills Co.* (1906), 146 Fed. 953, is the fourth case cited by the Circuit Court of Appeals in support of its decision. The case arose in Ohio under a statute making the ignition of a fire by sparks from a locomotive *prima facie* proof of negligence. The case went to the jury, which found for the plaintiff, and on the appeal the issue was whether or not the trial court erred in instructing the jury that the defendant could escape liability only by proving, by a preponderance of the evidence, that its engine was equipped with the best and most effective spark arrester and that it was in good condition and operated by competent and skillful men. The court held that the instruction was erroneous because the Ohio statute did not shift the burden of proof.

The opinion was written by Lurton, J. It admitted that proof that the railway company set the fire required the submission of the case to the jury and dealt with the question of the force of the statutory presumption.

The opinion of the Circuit Court of Appeals in the case at bar stated that this case affirmed the Garret case. It affirmed the *Garrett* case's holding that no legal presumption of negligence was created but it did not decide any proposition of law contrary to petitioner's contention or affirm any ruling in the *Garrett* case which did this. The manner in which this case and the *Garrett* case is referred to in the opinion of the Circuit Court of Appeals indicates that that court did not correctly understand petitioner's contention or the law as established by the federal cases. The issue in this case does not concern where the burden of proof lies after a case for the jury has been made out, but, rather, whether the proof that the fire is of railroad origin creates a *prima facie* presumption of fact requiring the case to be submitted to the jury. The Circuit Court of Appeals evidently mistakenly thought that petitioner contended that such proof created a legal presumption of negligence and that petitioner had to establish this proposition in order to be entitled to reversal.

5. The fifth and last case cited by the Circuit Court of Appeals in support of its decision is *Louisville & N. R. Co. v. Bell*, (1913), 206 Fed. 395. This case arose in Tennessee where there was no statute relating to the setting of fires. The trial court denied a motion for a directed verdict and submitted the case to the jury, which found for the plaintiff. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court. It found that the evidence contained proof tending to show that the railway company's locomotive was negligently operated and (at page 399) pointed out that it specifically refused to pass upon the question of whether or not a case sufficient for the jury would have been made out had such evidence been lacking.

In not one of the cases cited in the opinion of the Circuit Court of Appeals, in the case at bar, was there a judgment of nonsuit or a directed verdict. Every case (save the *Nitro-Glycerine* case which was tried by the Court) went to the jury. Petitioner has not found, and hereby challenges the respondent to produce, a single federal case in which the origin of the fire has been proved, where the plaintiff, in the absence of any showing of care by the railway company, has been denied the privilege of having the jury draw the inference that the railway company was guilty of negligence.

It is submitted that the rule in the Federal Courts is clearly in petitioner's favor.

RULE IN WASHINGTON

The rule in the State of Washington is in full accord with petitioner's contention as is demonstrated by three cases which will now be given attention.

1. In *Thorgrimson v. Northern Pac. Ry. Co.*, (1911), 64 Wash. 500, the court said:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (Overacker v. Northern Pac. R. Co., ante p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on the questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. * * * It is the proof of setting the fire * * * that raises the inference of negligence * * *."

2. In *Northwestern Mut. Fire Ass'n v. Northern Pac. Ry. Co.* (1912), 68 Wash. 292, the court said:

"In a foot note to the case of *Atchison etc., R. Co. v. Geiser*, 1 Am. & Eng. Ann. Cases, the annotator, at page 815, says:

" 'In England and in many of the states of the Union, it is held that the mere fact of communication of fire by a railroad engine is, of itself, sufficient to raise a presumption of negligence against the railroad company, or in other words, that proof of such communication is sufficient to make out a *prima facie* case of negligence against the defendant in an action for injuries caused by the fire.'

"After supporting this statement by citing numerous cases, the annotator, at page 816, further says:

" 'In some jurisdictions this doctrine is the result of express legislative enactment, or is, at least, sanctioned by statute. Such, as will appear from the decisions above cited from those states, is the case in Arkansas, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Jersey, North Dakota, Ohio, Utah, and Vermont. But in many, if not all, of the other states from which decisions are cited above, the rule has been adopted irrespective of statute; and in a number of cases it has been expressly stated that the principle is one of the common law, and not dependent upon legislative enactment.'

"This statement, which is in harmony with our own decisions, is also supported by additional citations of authority from North Carolina, South Dakota, and Tennessee."

3. *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.* (1917), 96 Wash. 113, is in harmony with the two preceding cases. It has been discussed already on page 11, of this brief.

In the case at bar the Circuit Court of Appeals acknowledged that the local law is in petitioner's favor (R. 119).

GREAT WEIGHT OF AUTHORITY FAVORABLE

The Circuit Court of Appeals decided an important question of general law in a way probably untenable and definitely in conflict with the great weight of authority.

The cases upon the issue at bar are legion and no useful purpose would be accomplished by discussing them in this brief. An appendix which lists the statutes and cases showing the status of the law in forty-four of the forty-eight states has been compiled and attached to this brief. Its author has been unable to discover the status of the law in the other four states which are Arizona, New Mexico, Rhode Island and Wyoming. In citing statutes in the appendix, codes and other compilations have been cited only when access to original sources could not be had.

A majority of the states have deemed it beneficial to the public welfare to settle the issue in the case at bar by legislative enactment. The statutes which these states have passed fall into two general classes:

(1) Those imposing absolute liability upon railways, irrespective of negligence, for fires set by them.

(2) Those which make proof that the railway company set the fire *prima facie* evidence of negligence.

Under a statute of either class proof that a railway locomotive set a fire is sufficient to carry the case to the jury. The twenty-six states listed in Table A in the appendix have statutes of the kind here referred to and in many of those states the law was the same, by judicial decision, before the legislature took action in the matter.

In the fourteen states listed in Table B in the appendix it is held, in the absence of statute, that proof that a railway locomotive emitted sparks which ignited a fire makes a *prima facie* case for the jury.

In only four states, those listed in Table C of the appendix, it is held, in the absence of statute, that a question for the jury is not raised by proof that a railway locomotive emitted sparks which ignited a fire.

RULE IN ENGLAND

There has never been any serious dispute as to the truth of the often repeated statement that in England proof that a fire has been caused by sparks emitted from a locomotive makes out a *prima facie* case of negligence requiring the case to be submitted to the jury.

Aldridge v. Great W. R. Co. (1841), 3 Man. & G. 515, 133 Eng. Rep. 1246, is directly in point. This

case has already been discussed on page 9 of this brief.

Pigott v. Eastern Counties R. Co. (1846), 3 C. B. 329, 136 Eng. Rep. 92, also supports petitioner's contention. In the opinion Tindall, C. J., said:

"The evidence in this case is abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendant's engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think that the jury came to a right conclusion, in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance * * *."

Maule, J., referring to the fire, said:

"I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence in the absence of evidence to shew that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, * * *. Upon the whole I think the verdict would have been wrong if it had been the other way."

This case is referred to with approval in *Hull v. Sacramento Valley R. Co., supra,* in which Justice Field concurred.

It should be borne in mind that in the case at bar, because a nonsuit was granted at the conclusion of

petitioner's evidence, there was no evidence whatsoever of any precaution adopted by the railway company. As far as the evidence in the record is concerned, it does not appear whether respondent's locomotive used a spark arrester or did not use a spark arrester.

RES IPSA LOQUITUR APPLIES

The cases relative to the issue at bar have been examined and discussed and the holdings and the principles upon which they are based so strongly suggest that the maxim *res ipsa loquitur* is applicable to railway fire cases, and has been applied to such cases, that petitioner is of the opinion that this brief would be incomplete if it did not give this matter at least brief consideration.

The meaning of *res ipsa loquitur* is clearly stated by this court in the leading case of *Sweeney v. Erving* (1913), 228 U. S. 233, wherein this court said:

"The general rule in actions for negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the

thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference which arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence."

Are railway fire cases in that class of exceptional cases to which the maxim is applicable? The language of Justice Holmes in *Graham v. Badger* (1895), 164 Mass. 42, 41 N. E. 61, is instructive upon this point:

"*Res ipsa loquitur*—which is merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of the particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence."

Thus, it appears, the proposition is reduced to this: If jurymen are warranted in believing, from their experiences as men of the world, that railway fires do not commonly happen except in consequence of negligence then the maxim is applicable to railway fire cases.

May jurymen justifiably entertain the view that railway fires do not commonly happen except in conse-

quence of negligence? In view of what courts have said in regard to this matter this question, it is submitted, can be answered only in the affirmative.

In *Dyer v. Maine Central Ry. Co.* (1904), 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416, the court said:

"We may presume that the defendant is not running locomotives over its road, the natural and probable effect of which would be to communicate fire to the property along its route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence."

In *L. & N. Ry. Co. v. Reese* (1889), *supra*, the court said:

"Though no mechanical contrivance has been invented, or is in use, which can effectually prevent the escape of fire from locomotives at all times and under all circumstances, from which injury may result, experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage, when the engines are properly constructed, are supplied with the most approved appliances for preventing the escape of fire, and are managed with care."

In *Ellis v. P. & R. R. Co.* (1839), 24 N. C. 138, 2 Iredell 112, Gaston, J., said:

"We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendants, but we hold, that when he shows damage resulting from their act, which act, with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless."

The *Ellis* case was referred to with approval in *Hull v. Sacramento Valley R. Co., supra,* in which Justice Field concurred.

In the *Garrett* case, *supra,* "the jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it (the fire) was caused by negligence." In approving the granting of this permission, Chief Justice Taft, who wrote the opinion when upon the Circuit Court of Appeals, said:

"The course of the court, we think, was well within the rule, as we understand the cases, which the Supreme Court of the United States has followed."

Unless this court is of the opinion that the cause of railway fires is ordinarily non-negligent and that such fires are not commonly due to negligence, then, in accordance with the view expressed in the last sentence quoted above from the opinion of Justice Holmes, the maxim *res ipsa loquitur* must be held to be applicable.

Petitioner submits that on principle the conclusion that the maxim is applicable to railway fire cases is inescapable. The courts of the country have been tacitly applying it to such cases for nearly a century. The mere recalling of the holdings of a large number of the cases cited in this brief will demonstrate the truth of this fact.

Not all of the courts, however, have failed to point out that their decisions, in railway fire cases, were based upon the application of the maxim.

Southern Ry. Co. v. Dickens (1909), 161 Ala. 141, 49 So. 766, was a railway fire case in which the facts were very similar to the facts in the case at bar. The court held that the plaintiff had made out a case for the jury and said:

"It has been held by the courts which decided that such evidence makes out a *prima facie* case of negligence, that * * * when it appears that the fire which caused the injury was ignited by sparks or other fire emitted from the locomotive, if not strictly so, it may be likened unto a case of *res ipsa loquitur*."

Williams v. Camp Mfg. Co. (1919), 177 N. C. 512, 99 S. E. 370, is squarely in point. The court quoted from *Sweeney v. Erving*, *supra*, and then, referring to the doctrine of *res ipsa loquitur*, said:

"The casting of sparks from a locomotive engine upon another's land, and burning the timber on it, is a striking illustration of this doctrine, and the rule we have mentioned applies strictly to such a case. There are many cases decided by this court in which it has been applied." (Abundant authority cited.)

Page v. Camp Mfg. Co. (1920), 180 N. C. 330, 104 S. E. 667, likewise recognizes the applicability of the maxim.

Cincinnati N. O. & T. P. R. Co. v. South Fork Coal Co. (1905), 139 Fed. 528, has already been discussed

on pages 25-27 of this brief. This issue was whether or not a collision occurring between two trains, from which a fire resulted, was caused by negligence. In the opinion the court discussed the maxim *res ipsa loquitur* and held that it was applicable. The opinion cited cases of injuries caused by falling objects wherein the maxim was applied.

By way of dictum the court expressed its opinion that the same principles did not apply to railway fires caused by sparks escaping because (it said) sparks could escape without the railway company being negligent. (The court probably overlooked the fact that a collision could occur in the absence of negligence.) The learned author of the note found on page 43 of L. R. A. 1917 E conclusively shows the fallacy in the reasoning which lead the court to make its inadvertent statement with reference to fires caused by sparks. His annotation, in part, reads as follows:

"The possibility that the accident in question may have happened without negligence on the part of the defendant does not necessarily defeat the application of the rule of *res ipsa loquitur*. The probability that the accident was due to negligence must, of course, outweigh the probability of a non-negligent cause; but to insist that the accident must be of such a character as absolutely to negative the possibility of a non-negligent cause, would be to destroy all scope for the doctrine, since, on that hypothesis, the happening of the accident would furnish conclusive evidence of negligence."

The text writers have long since recognized the applicability of the maxim to railway fires. 29 Cyc. 595; II Thompson's Commentaries on the Law of Negligence, Sec. 2285. The author of the text last cited, in Vol. II, Sec. 2287, bemoans the fact that some of the courts failed to appreciate the applicability of the maxim to such cases. He states:

"The principles which should have been applied by the judges at the outset, the failure to comply with which has been productive of a long train of injustice against agricultural communities, which the legislatures have been obliged to step in and remedy, is that the mere fact of ignition, when it is shown to have preceded from the locomotive, is *prima facie* evidence of negligence *under the principle of res ipsa loquitur.* There was every reason, founded in a sound public policy, in applying this principle to this subject." (Italics supplied.)

The application of the maxim to railway fire cases would not be unjust to the railway companies because, as this court pointed out in *Sweeney v. Erving, supra*:

"The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect * * * attributable to defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence."

It is not necessary to the application of the maxim that a contractual obligation exist between the plaintiff and the defendant for the rule of the maxim originates from the nature of the act and not the relations between the parties. *Rose v. Stephens & Condit Transp. Co.* (1882), 11 Fed. 438; 29 Cyc. 591.

The maxim has been applied to a wide variety of cases including cases of explosions, landslides, and passengers on railway trains. It has often been applied to cases wherein someone is injured by being struck by a falling object. Stevedore injured by the fall of a stanchion, *The William Branfoot*, 52 Fed. 390; brick falling out of pier on railway bridge upon person passing on highway underneath, *Kearney v. London & Ry.*, L. R. 6 Q. B. 759; pedestrian on public street injured by fall of barrel of flour from a window above shop adjoining street, *Byrne v. Boadle*, 2 Hurt. & Culb. 721, 726; customs collector passing in front of warehouse in dock struck by fall of bags of sugar which were being lowered from above, *Scott v. The London Docks Co.*, 3 Hurl. & Colt, 596, 600.

By reason of the fact that the use of airplanes is now increasing rapidly there will undoubtedly soon be cases of injuries being caused by the negligent dropping of objects. This court, it is submitted, should be slow to adopt a rule which will, in effect, leave the injured person without a remedy.

Petitioner submits that the maxim *res ipsa loquitur* is applicable to railway fire cases, has been often applied in such cases, and is the rule most consistent with the welfare of the general public.

CONCLUSION

Petitioner contends:

1. That the evidence in the case at bar was such that the jury, if permitted to do so, might have reasonably drawn the inference that respondent was negligent in failing to divide its train, as it sometimes did, and in running a seventy-car double-header freight train over the upgrade past Badger, under the conditions existing at the time it did so.

2. That the establishing, by sufficient evidence, that respondent caused the fire in question raised a question of fact for the jury—the question of respondent's negligence—which the court should have submitted to the jury. Petitioner contends that the decision of the Circuit Court of Appeals upon this point is in direct conflict with the rule in the State of Washington and the rule in the federal courts and that the holding is untenable and contrary to the weight of authority both in the United States and in England.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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APPENDIX

TABLE A

The states here listed have statutes (cited below) which either impose absolute liability on railroads for fires set by them, irrespective of negligence, or make the fact of the fire *prima facie* evidence of negligence.

1. Arkansas, Act Apr. 2nd, 1907, Laws of 1907, p. 336.
2. Colorado, Session Laws 1887, p. 368.
3. Connecticut, Gen. Stat. 1919, Sec. 5739.
4. Florida, Gen. Stat, 1906, Sec. 3148.
5. Georgia, Code 1873, Sec. 3033.
6. Illinois, Starr. & C. Stat. Ill. 1885, p. 1949, Sec. 104.
7. Indiana, Burns Ann. Stat. 1914, Sec. 5525a.
8. Iowa, Code 1897, Sec. 1289.
9. Kansas, Gen. Stat., par. 1321, and Stat. 1901, Sec. 5923.
10. Kentucky, Ken. Stat. 1903, Sec. 782 (see case 97 So. 727).
11. Maine, Rev. Stat. Ch. 51, Sec. 64.
12. Maryland, Code, Art. 77, Sec. 1.
13. Massachusetts, Gen. Laws Mass. 1921, Ch. 160, Sec. 234.
14. Michigan, How. Stat., Sec. 3378.
15. Minnesota, Gen. Stat. 1878, Ch. 34, Sec. 60.
16. Mississippi, Code, Sec. 1059.
17. Missouri, Rev. Stat. 1889, Sec. 2615.
18. New Hampshire, Pub. Stat., Ch. 159, Sec. 29.
19. New Jersey, Rev. Stat. 911, Sec. 16.
20. North Dakota, Comp. Stat. 1913, Sec. 4654.
21. Ohio, Page Ohio Code, Secs. 69, 70, 71, 72.
22. Oklahoma, Comp. Stat. Okla. 1921, Sec. 3851.
23. South Carolina, S. C. Civ. Code 1902, Sec. 2135.
24. South Dakota, Rev. Code S. D. 1919, Sec. 9705.
25. Utah, Comp. Laws 1876, Ch. 217, Sec. 503.
26. Vermont, Rev. Laws 1880, Sec. 3444.

TABLE B

In the states listed below, where the subject is not determined by statute, the holding is that proof that the railroad company set the fire makes out a *prima facie* case of negligence.

1. Alabama, Southern Ry. Co. v. Johnson (1905), 141 Ala. 575, 37 So. 919; Southern Ry Co. v. Dickens (1909), 161 Ala. 141, 49 So. 766.
2. California, Hull v. Sacramento Valley Ry. Co. (1859), 14 Cal. 388.
3. Idaho, Fodey v. N. P. Ry. Co. (1912), 21 Idaho 713, 123 Pac. 835; Osburn v. Oregon R. & N. Co. (1908), 15 Idaho 478, 98 Pac. 627, 19 L. R. A. N. S. 742, 16 Ann. Cas. 879.
4. Louisiana, Fuller v. Chicago Ry. Co. (1914), 137 La. 997, 69 So. 804.
5. Montana, Missoula Trust Co. v. N. P. Ry. Co. (1926), 76 Mont. 201, 245 Pac. 949.
6. Nebraska, Shipman v. Chicago, etc., Ry. Co. (1907), 78 Neb. 43, 110 N. W. 535; Westing v. Chicago B. & Q. Co. (1910), 87 Neb. 655, 127 N. W. 1076.
7. North Carolina, Page v. Camp Mfg. Co. (1920), 180 N. C. 330, 104 S. E. 667; Williams v. Camp Mfg. Co. (1919), 177 N. C. 512, 99 S. E. 370.
8. Oregon, Chenoweth v. So. Pac. Ry. Co. (1909), 53 Ore. 111, 99 Pac. 86.
9. Tennessee, Burk v. Railroad Co., 7 Heisk 451; Simpson v. Railroad Co., 5 Lea 456.
10. Texas, St. Louis Ry. Co. v. Eccles (1909), 53 Tex. Civ. App. 218, 115 S. W. 648; Chicago Ry. v. Meyers (1926), 285 S. W. 1058.
11. Virginia, Phillips v. So. Ry. Co. (1909), 109 Va. 436, 63 S. E. 998.
12. Washington. (See the 3 cases cited in brief.)

13. West Virginia, Wilson v. Bush (1911), 70 W. Va. 26, 73 S. E. 59.
14. Wisconsin, Bonnell v. Chicago Ry. Co. (1915), 158 Wis. 153, 147 N. W. 1046; Spaulding v. C. & N. W. Ry. (1873), 33 Wis. 582.

TABLE C

In the states listed below, where the subject is not determined by statute, the holding is that proof that the railroad company set the fire does not make out a *prima facie* case of negligence:

1. Delaware, Director Gen. of Rys. v. Johnson (1926), 133 Atl. 158; Jefferis v. Railroad Co. (1886), 3 Houst. 447 (Superior Ct.).
2. Nevada, Longbaugh v. Virginia City Railway (1874), 9 Nev. 295.*
3. New York, Case v. N. Cent. Ry. Co. (1871), 59 Barb. 644; McCaig v. Erie Ry. Co. (1876), 59 Barb. 646; Peck v. N. Y. Cent. Ry. Co. (1901), 165 N. Y. 347, 259 N. E. 206.
4. Pennsylvania, Taylor v. Penn. Valley Ry. Co. (1909), 174 Pa. St. 171; Jennings v. Penn. Ry. Co. (1880), 93 Pa. St. 337.

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*The question has never been squarely presented in Nevada.